

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSE ANTONIO ORTIZ,
Plaintiff,

v.

LAURA CAMPOS, et al.,
Defendants.

No. 1:23-cv-00398 JLT GSA (PC)

ORDER NOTING FOR RECORD THAT
PLAINTIFF'S VOLUNTARY DISMISSAL
CONSTITUTES STRIKE WITHIN MEANING
OF 28 U.S.C. § 1915(g)

ORDER DIRECTING CLERK OF COURT TO
CLOSE CASE PURSUANT TO FEDERAL
RULE OF CIVIL PROCEDURE 41(a)(1)(A)(i)

(ECF No. 16)

Plaintiff, a state prisoner proceeding pro se and in forma pauperis, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

Plaintiff has filed a notice of voluntary dismissal. ECF No. 16. Accordingly, the Clerk of Court will be formally directed to close this case. In addition, the Court will note for the record that this case constitutes a strike within the meaning of 28 U.S.C. § 1915(g).

I. RELEVANT FACTS

On March 11, 2024, Plaintiff's complaint was screened. ECF No. 14. In the screening, the Court found that the complaint failed to state a claim upon which relief could be granted. See

1 id. at 5-6. As a result, Plaintiff was ordered to file an amended complaint and to do so within
2 thirty days. Id. at 9.

3 Plaintiff failed to file an amended complaint within the time allotted. Consequently, on
4 April 25, 2024, the Court ordered Plaintiff to show cause why this matter should not be dismissed
5 for failure to prosecute and for failure to obey a court order. ECF No. 15 at 2. In the order, as an
6 alternative to filing a showing of cause, Plaintiff was given the opportunity to simply file an
7 amended complaint as he had been previously ordered to do. See id.

8 On May 6, 2024, instead of filing a showing of cause or filing an amended complaint,
9 Plaintiff filed the instant notice of voluntary dismissal. ECF No. 16. In the notice, Plaintiff states
10 that he has made the choice to dismiss the case because the Court's screening order indicates that
11 he cannot not prevail on his claims as presented. Id.

12 II. DISCUSSION

13 A. Applicable Law: 28 U.S.C. § 1915(g)

14 28 U.S.C. § 1915(g) states:

15
16 In no event shall a prisoner bring a civil action or appeal a judgment in a civil action
17 or proceeding under this section if the prisoner has, on 3 or more prior occasions,
18 while incarcerated or detained in any facility, brought an action or appeal in a
19 court of the United States that was dismissed on the grounds that it is frivolous,
malicious, or fails to state a claim upon which relief may be granted, unless the
prisoner is under imminent danger of serious physical injury.

20
21 A dismissal counts as a strike under Section 1915(g) “when (1) a district court dismisses a
22 complaint on the ground that it fails to state a claim, (2) the court grants leave to amend, and (3)
23 the plaintiff then fails to file an amended complaint” regardless of whether the case was dismissed
24 with or without prejudice. Harris v. Mangum, 863 F.3d 1133, 1142-43 (9th Cir. 2017). “When
25 [] review[ing] a dismissal to determine whether it counts as a strike, the style of the dismissal or
26 the procedural posture is immaterial.” El-Shaddai v. Zamora, 833 F.3d 1036, 1042 (9th Cir.
27 2016) (brackets added); see Windham v. Franklin, No. 1:16-cv-05888 SVW JEM, 2018 WL
28 1626250, at *3 (C.D. Cal. Jan. 25, 2018) (referencing Harris and stating technical reason for

1 dismissal irrelevant under Section 1915(g)). “Instead, the central question is whether the
2 dismissal ‘rang the PLRA bells of frivolous, malicious, or failure to state a claim.’” El-Shaddai,
3 833 F.3d at 1042 (citations omitted) (quotation marks in original). “A prisoner may not avoid
4 incurring strikes simply by declining to take advantage of these opportunities to amend.” Harris,
5 863 F.3d at 1143.

6 B. Analysis

7 In this case, the Court screened Plaintiff’s complaint and determined that it failed to state
8 a claim upon which relief could be granted. See generally ECF No. 14. As a result, Plaintiff was
9 ordered to file an amended complaint. Id. When Plaintiff failed to do so, he was given a second
10 opportunity to file amended complaint in lieu of filing a showing of cause why the matter should
11 not be dismissed. See ECF No. 15. Less than two weeks later, instead of either filing an
12 amended complaint or a showing of cause, Plaintiff opted to voluntarily dismiss this matter
13 because “the Magistrate . . . led [him] to believe that [he would] not prevail” in this case. See
14 ECF No. 16 at 1 (brackets added).

15 Given these facts, consistent with Harris, the dismissal of this case counts as a strike
16 within the meaning of Section 1915(g). See Harris, 863 F.3d at 1142-43. The fact that Plaintiff
17 voluntarily dismissed it after the Court found the complaint failed to state a claim does not change
18 this. See El-Shaddai, 833 F.3d at 1042 (stating style of dismissal or procedural posture is
19 immaterial when determining if dismissal is strike). Therefore, for future reference, this order
20 notes Plaintiff’s dismissal as a strike in the record.

21 Accordingly, IT IS HEREBY ORDERED that:

22 1. Consistent with Harris v. Mangum, 863 F.3d 1133, 1142-43 (9th Cir. 2017) and El-
23 Shaddai v. Zamora, 833 F.3d 1036, 1042 (9th Cir. 2016), Plaintiff’s voluntary dismissal of this
24 matter shall be considered a strike within the meaning of 28 U.S.C. § 1915(g), and

25 2. Consistent with Plaintiff’s filing of a notice of voluntary dismissal pursuant to Federal
26 Rule of Civil Procedure 41(a)(1)(A)(i) (see ECF No. 16), the Clerk of Court shall CLOSE this
27 case.
28

IT IS SO ORDERED.

Dated: May 8, 2024

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE